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INTERNATIONAL LIABILITY FOR INJUROUS CONSEQUENCES ARISING OUT OF ACTS NOT PROHIBITED BY INTERNATIONAL LAW (PREVENTION OF TRANSBOUNDARY HARM FROM HAZARDOUS ACTIVITIES)

Statement of the Chairman of the Drafting Committee, Mr. Peter Tomka

I have the honor to introduce the first report of the Drafting Committee for the 53rd session of the Commission, which deals with the Prevention of Transboundary Harm from Hazardous Activities. I am pleased to report that the Drafting Committee completed the second reading of the draft articles on this topic the texts and the titles of which are contained in document A/CN.4/L.601 and Corr.1 (English only) and Corr.2.

The Drafting Committee held 7 meetings beginning from the second day of the Commission, on 24 April until May 2. Before introducing the report, I would like to thank Mr. P.S. Rao, the Special Rapporteur, for his guidance and his substantial contribution to the work of the Committee. I wish also to express my appreciation to the members of the Drafting Committee for their cooperation and assistance.

Mr. Chairman,

I would also like to note that in addition to members of the Drafting Committee for this topic, Mr. Opertti-Badan participated actively in the work of the Drafting Committee and his name should therefore be included in the list of the membership of the Drafting Committee.

Mr. Chairman,

This year, which is the last year of the quinquennium, the Commission will be in a position to complete almost two of its long-standing topics. The topic of State Responsibility, which was born at about the same time as the Commission itself and the International liability topic, its younger sibling that was born 23 years ago. My use of qualification of “almost complete” was intended to refer to the Liability topic in which the Commission decided to divide it into two topics of Liability and Prevention.

You will recall that the Commission completed the first reading of the draft articles on the prevention aspect of the topic which was entitled "Prevention of transboundary damage from hazardous activities" in 1998 and circulated the draft articles to Governments for comments. Last year, the Commission established a Working Group to assist the Special Rapporteur with consideration of Governments' comments. On the basis of the work of that Working Group, the Special Rapporteur submitted a report proposing some revisions for some of the articles. The Commission held a short debate on that report and referred the articles to the Drafting Committee. Last year, the Drafting Committee did not have time to consider the articles. This year, however, as a first item on its agenda, the Drafting Committee considered and completed the second reading of the draft articles, which I have the honor of introducing to you now.

In terms of structure, the Drafting Committee made no substantial changes to the draft as proposed by the Special Rapporteur last year. You will, however, recall that the text adopted on first reading did not have a preamble or any articles dealing with emergency situations. Last year the Special Rapporteur proposed a text for a preamble and 2 articles dealing with emergencies.

With your permission sir, I will introduce the title of the topic and the articles and will then come back to the introduction of the Preamble.

Title

Mr. Chairman,

The title of this topic when it was separated from its liability part, was, in English, "Prevention of Transboundary **Damage** from Hazardous Activities". In view of the fact that the draft articles speak of transboundary "harm" and not transboundary "damage", the Drafting Committee changed the word "Damage" to "Harm" for linguistic consistency. The title of the topic is therefore changed, in English, to "Prevention of Transboundary **Harm** from Hazardous Activities". This change does not affect French, Spanish or Russian versions of the title.

You will also recall that in his last year report, the Special Rapporteur had added the word "Convention" to the title. The Drafting Committee deleted that word, which in its view was a decision on the nature of an instrument outside its competence and which rested exclusively with the Plenary which always makes a recommendation on that issue to the General Assembly.

Article 1

Mr. Chairman,

I will now introduce the draft articles. The first article is article 1, which sets the scope of the draft articles.

The Drafting Committee made no changes to this article. You will note that this article being an off-shout of the topic of the international liability, carries part of the characterization of the activities covered by that topic. It speaks of "activities not prohibited by international law" which involve a risk of causing significant transboundary harm through their physical consequences. Comments were made by some governments and in the Drafting Committee as well that it might be better to delete the reference to the words "not prohibited by international law" and speak of "activities which involve a risk of causing significant transboundary harm". This suggestion was made because of the concern that it is not always clear whether a particular activity was or was "not prohibited by international law". Furthermore, in the view of the proponents of that suggestion, a State that is likely to be affected by an activity should always be in a position to require from the State whose activity is posing the risk of transboundary harm to comply with the obligations under these articles irrespective of whether the activity is or is not prohibited. In addition, an invocation of these articles by a State likely to be affected should not be used as a bar to a later claim by that State that the activity is question was a prohibited activity. The Drafting Committee, as a whole, however, were of the view that the words activities "not prohibited by international law" was intended to separate this topic from the topic of State Responsibility which dealt with activities which were prohibited by international law or were wrongful. At this time the removal of this

boundary demarcation between the two topics could only create confusion. The Drafting Committee, however, agreed with the concerns that the separating lines between activities not prohibited by international law and those prohibited by international law are not always clearly visible and that invocation of these articles should not *per se* bar a claim that an activity in question is in fact a wrongful act. The commentary to this article should elaborate on this issue.

The title of the article is changed to "Scope" which is short and simple.

Article 2

I will now move to article 2 which defines 6 commonly used terms in the draft. The Drafting Committee made some minor changes to article 2 on the Use of Terms.

Subparagraph (a) defines the concept of "risk of causing significant transboundary harm". This has proved not to be an easy task. The intention of the Commission is clear. It intends to refer to the combined effect of the probability of occurrence of an accident and the magnitude of injurious effect of that accident if it were to occur. It is therefore, the combined effect of "risk" and "harm" which sets the threshold. The text that was adopted on first reading had anticipated two sets of categories of such a complex relationship between the probability of risk and the magnitude of harm. Those were the "low probability of causing disastrous harm and a high probability of causing other significant harm". This approach had caused some confusion among governments as to whether the article was speaking of a range of alternatives or just two alternatives. The Special Rapporteur with the assistance of a Working Group established last year suggested a different formula defining this concept differently, namely that it means "a risk ranging from a high probability of causing significant harm to a low probability of causing disastrous harm". By the new formulation, the Special Rapporteur intended to signify that there were a number of alternatives at one end of which there was a high probability of significant harm and at the other end there was the low probability of a disastrous harm. That revised formulation in view of the Drafting Committee added to the confusion since logically there was no range between the two identified set of

activities. Either an activity will have a high probability of causing significant transboundary harm or has a low probability of causing disastrous harm. In effect, in view of the Committee, a modified version of the first reading text would be preferable to the revised text and further explanations should be given in the commentary.

The text before you defines the "risk of causing significant transboundary harm" as including risks taking the form of a high probability of causing significant transboundary harm and a low probability of causing disastrous transboundary harm. The two broad categories of such activities are identified. An analysis between the probability of causing transboundary harm and the impact of the harm would have to be determined in relation to factual circumstances and the context surrounding a particular activity. It would be impossible to provide any further legal criteria, which could be helpful and not create further confusion.

You will also note that the word "transboundary" has been inserted before the word "harm" in order to signify that the articles deal only with "transboundary harm".

With regard to subparagraph (b), the Drafting Committee only replaced the words "'harm' includes" with the words "'harm' means" which makes the text consistent with subsequent subparagraphs.

The Drafting Committee made no changes in subparagraph (c), which defines "transboundary harm".

As for subparagraph (d), the Drafting Committee made the language consistent with that of article 11, according to which the State in whose territory an activity is planned to take place is also considered the State of origin. Consequently the latter part of the subparagraph reads "activities referred to in article 1 **are planned or** are carried out.

With regard to subparagraph (e), there were comments by a government pointing to a potential inconsistency between the definition of "State likely to be affected" and subparagraph (a) where it speaks of States being at a risk of being affected. The Drafting Committee revised the text of this subparagraph by using the language of subparagraph (a). You will also note that "State likely to be affected" is defined as including one or more States. This change was considered helpful to cover situations in which there is more than one State likely to be affected. You will however note that the State of origin is always defined in singular. This is because of the definition of the State of origin, which can only refer to one State. The draft articles, however, do not exclude the possibility that there may be situations where there is more than one State of origin. For example, it is conceivable that two neighboring States plan or launch an activity on the joint border expanding into the territory of both States and so forth.

Subparagraph (f) was proposed last year by the Special Rapporteur for additional clarity and the Committee retained the text.

Article 3

Mr. Chairman,

Article 3 is a key article. It sets out the general obligation of prevention on which the entire set of draft articles is based. The article seemed acceptable to governments. The Drafting Committee introduced mere drafting changes that do not affect the substance. The subject of the sentence "The State**s** of origin" was modified to the singular form so as to ensure coherence with the definitions in article 2 and for reasons I explained earlier.

The latter part of the sentence was restructured so that the phrase "significant transboundary harm" is placed immediately after the word "prevent". This modification serves the purpose of clarifying that the primary objective of the measures to be taken by States is the prevention of significant transboundary harm, while the minimization of risk would constitute a secondary option in case the objective of prevention cannot be attained. The prior formulation could have been perceived as placing both the prevention

of significant transboundary harm and the minimization of risk on an equal footing. In order to clarify that this was not the case, the Committee inserted the words “or at any event” in the latter part of the sentence.

The commentaries shall contain an explanation that “all appropriate measures” include the obligation of the States parties to, *inter alia,* adopt the respective national legislation, which would incorporate internationally accepted standards. These standards would constitute the benchmark when considering the suitability of the measures. Furthermore, the commentary shall emphasize that article 3 is complementary to articles 10 and 11 and that they all constitute a harmonious ensemble.

Article 4

Mr. Chairman,

Article 4, which deals with cooperation among the States concerned, was also accepted by governments. The only drafting changes made to the draft article 4 were those necessary to align it with the revised version of article 3, as regards the primacy of the prevention of significant transboundary harm in relation to the minimization of risk. No other changes were made in the text.

Article 5

I will now move on to article 5 which states the obvious, namely that once a State becomes a party to the present draft articles, it would be required to take the necessary measures to implement them. This article also was not a subject of comments by governments. The text is therefore unchanged from that adopted on first reading. However, in order to allay the concern that the draft article could be misinterpreted to mean that only States that have plans for an activity falling under the scope of these articles would be obliged to take the steps referred to in the provision, it was considered necessary that the commentary clarify that this provision was applicable to any State if it is foreseeable that said State was susceptible of becoming a State concerned. Thus it would be made clear that the provision was obligatory upon all States parties in regard to

the legislative and administrative matters, while the measures for the establishment of monitoring mechanisms would only be incumbent upon the States concerned.

Article 6

Article 6 corresponds to article 7 adopted on first reading. The Drafting Committee made some changes to the revised text proposed by the Special Rapporteur for stylistic reasons and also for further clarification of the text.

In paragraph 1 for purposes of clarity, the opening clause was changed from the passive to the active voice. A few minor editorial changes were introduced to the beginning of two subparagraphs. In subparagraph (a), the word "activities" was changed to its singular form and it is now preceded by "any" instead of "all". In subparagraph (c), the "a" before "plan" now reads "any", thus aligning itself with the preceding two paragraphs. These changes have no bearing on the meaning of the article. They were introduced for consistency in use of the same terms in other parts of the draft.

The Drafting Committee made no changes in paragraphs 2 and 3 as was proposed by the Special Rapporteur in his last year report.

Article 7

Mr. Chairman,

Article 7 corresponds to article 8 adopted on first reading. It basically provides that before granting authorization for an activity within the scope of these articles, there must be an assessment of the possible transboundary harm of the activity. The text before you is slightly modified from that proposed by the Special Rapporteur and consequently from the first reading text. The modifications, however, do not affect the substance of the article. They only make it clearer.

The article is in keeping with the contemporary trends in international law of requiring environmental impact assessment of any activity, which may cause significant environmental harm. In the context of our draft, this requirement is limited to

transboundary hazardous effect. The article requires that a decision by a State to authorize a particular activity or change in an ongoing activity that falls within the scope of these articles shall be based on an assessment of the possible transboundary harm of the activity. In view of the novelty of this requirement, the words "in particular", in the second line, were added by the Special Rapporteur to signify the importance of this requirement. The relevance of possible transboundary harm is not at the exclusion of other factors as relevant in making a decision for authorizing an activity. Its relevance has only been highlighted.

You will also note that the Drafting Committee has added the phrase "including any environmental impact assessment" at the end of the paragraph. The issue was raised in comments by some Governments and also in the Drafting Committee as to whether or not the notion of "assessment of possible transboundary harm" was the same as "environmental impact assessment". In view of the Drafting Committee, the words "assessment of the possible transboundary harm" should be understood in the context of the definition of the term "harm" in article 2(b) in which harm is defined as "harm caused to persons, property or the environment". Therefore the notion of "assessment of the possible transboundary harm" is broad. However, in order to emphasize again the contemporary trend of the requirement of environmental impact assessment, the last phrase has been added to highlight its novelty and importance.

The word "authorization" has been used and not "**prior** authorization" to take account of two possibilities. First, when authorization is required for a new activity to be undertaken and second, to take account of a change which may be proposed with regard to an ongoing activity.

The title of the article adopted on first reading was "Impact assessment". Last year, the Special Rapporteur, proposed to change it to "Environmental impact assessment". In view of the Drafting Committee, that modification did not reflect the content of the article, which was slightly broader. The revised title is "Assessment of

risk" which, in the view of the Drafting Committee, is sufficiently broad to better reflect the content of the article.

Article 8

I will now draw your attention to article 8, which corresponds to article 10 adopted on first reading. This article addresses a situation where the assessment conducted under article 7 indicates the activity planned does indeed pose a risk of causing significant transboundary harm. This article together with articles 9 and 10 which I will introduce later, provides for a set of procedures which are essential in attempting to balance the interests of all the States concerned by giving them reasonable opportunity to find a way to undertake appropriate preventive measures.

In his last year report, the Special Rapporteur had introduced some drafting changes. The revised text of this article appeared acceptable to governments since they did not made any comments. The Drafting Committee only made minor drafting changes. It deleted the word "prior" before the word "authorization" in paragraph 2 for the reasons I explained in the context of article 7, namely to include authorization for a new activity as well as for changes to an ongoing activity. Again in paragraph 2, the Drafting Committee, replaced the words "within a reasonable time and in any case within a period of six months" with "within a period not exceeding six months" which seemed clearer.

Article 9

Mr. Chairman,

Article 9 corresponds to article 11 adopted on first reading. The article deals with consultations on preventive measures. On first reading this article comprised 3 paragraphs. Last year the Special Rapporteur, at the suggestion of the Working Group, added a sentence to the end of paragraph 1. It also moved paragraph 3 of article 13 adopted on first reading, which now appears as article 11, to this article with the idea of including all the provisions on consultations in a single article. I will address these two issues separately.

With regard to the addition to paragraph 1, which appears as the last sentence of that paragraph, and provides that the States concerned shall agree on a reasonable time-frame for consultations, the Drafting Committee only made minor drafting changes with no effect on the substance of the requirement. You will also note that the first sentence of paragraph 1 is aligned with the drafting change made in articles 3 and 4. It now speaks of "to prevent significant transboundary harm or at any event to minimize the risk thereof".

With regard to the placement of paragraph 3 of the original article 13 now as article 11, the Drafting Committee found it confusing. While it is true that both provisions speak of consultations, they do so in very different time sequences. Consultations in this article are expected to take place prior to authorization of an activity. In the context of article 11, such consultations normally occur after authorization for the conduct of activity is granted or even when the activity is about to start or it has already started. For this reason, the Drafting Committee moved the paragraph back to article 11, its original place.

Article 10

I will now move on to article 10, which corresponds to article 12 adopted on first reading. The purpose of this article is to provide some guidance for the States in their consultations about an equitable balance of interests. Governments have welcomed the article and have made no major drafting suggestions and accordingly, the Drafting Committee did not alter the text.

Article 11

Article 11 corresponds to article 13 adopted on first reading.

With regard to paragraph 1, the Drafting Committee introduced some minor drafting changes. In this regard, the word "have" found in the first sentence was amended to read "involve", thus ensuring consistency with article 1.

The words “to it” were inserted after the phrase “risk of causing significant transboundary harm” in order to clarify that not any State could request the application of article 8, but only one which was threatened by the risk of such harm.

Furthermore, the end of the first sentence was redrafted to avoid the use of the words “the former State” and “latter”; these words have been replaced with the pronoun “it” and the more precise term “State of origin”, respectively.

In paragraph 2, for similar reasons of clarity, in the first sentence, the words “other State” have been replaced with “requesting State”. The second sentence was also redrafted without affecting the substance; consequently the prior double reference to “other State” was deleted.

Paragraph 3 was moved back from draft article 10 proposed by the Special Rapporteur in his last year report, where it had been inserted as paragraph 2 bis. The Drafting Committee made no other changes to this article.

Article 12

I will now move on to article 12, which corresponds to article 14 adopted on first reading. This article deals with steps to be taken after an activity has been undertaken with the purpose of preventing significant transboundary harm or minimizing the risk thereof. On this article, States had not submitted any drafting suggestions. The Drafting Committee made some minor drafting changes to align the article with articles 3 and 4 with regard to the use of the words “preventing significant transboundary harm or at any event minimizing the risk thereof”. The Drafting Committee, also inserted the phrase “concerning that activity” after the words “all available information”, thus clarifying the link between the information and the activity.

In the course of its consideration of this draft article, the Committee was of the view that the text merited a reformulation to ensure that the provision was applicable not only while an activity was “carried out”, but that the exchange of information should

continue even in instances where the activity had ceased; an example given in this regard was an activity dealing with nuclear waste. In order to address such cases, the Committee decided to include a new second sentence which reads: "Such an exchange of information shall continue until such time as the States concerned consider it appropriate even after the activity is terminated." The purpose of this additional sentence is not to require the continuation of exchange of information with regard to every activity even after that activity has been terminated. But it is a recognition of the fact that the consequences of certain activities even after they are terminated continue to pose a significant risk of transboundary harm. Under these circumstances, the obligations of the State of origin do not terminate by terminating the activity. The exchange of information after the termination of such activities should remain and the States concerned should continue to monitor the potential risk and be prepared to deal with it when and if it is materialized. The commentary shall elaborate on this issue.

Article 13

Mr. Chairman,

Article 13 corresponds to article 9 adopted on first reading. The article is inspired by the new trends of seeking to involve in a State's decision-making process those people whose lives, health and property might be affected, by providing them with a chance to present their views to those responsible for making the ultimate decisions.

Comments by governments indicated that they did not have any substantive or drafting problems with this article. Therefore the Drafting Committee made no changes in the text of this article as adopted on first reading. The Drafting Committee only placed the article right after article 12, which seemed more appropriate in the context of these articles.

Article 14

I will now draw your attention to article 14, which corresponds to article 15 adopted on first reading. This article provides a narrow exception to the obligation of the State of origin to provide information under other articles of the draft.

The formulation of this article was well accepted by governments. There was however a suggestion by a government to include a reference to "intellectual property" in the text since the term "industrial secrets" was not sufficiently broad. The Drafting Committee agreed with this view and inserted the phrase "or concerning intellectual property". The Drafting Committee agreed that "industrial secrets" were a part of "intellectual property" but decided to retain both terms just to make certain that the article provides sufficient coverage to protected rights.

The Drafting Committee also made some minor drafting changes for consistency of the use of terms. It replaced, in the third line, the words "other States concerned" with "States likely to be affected" in order to be consistent with article 2 on use of terms. Also in the last line, the Committee replaced the words "can be provided" with the word "possible" just to avoid the use of the word "provide" too often in the same article.

Article 15

I will now draw your attention to article 15 which corresponds to article 16 adopted on first reading and is based on article 32 of the Convention on the Law of the Non-Navigational Uses of International Watercourses. It sets out the basic principle that the State of origin is to grant access to its judicial and other procedures without discrimination on the basis of nationality, residence or the place where the harm occurred.

The only drafting amendment introduced by the Committee was to modify the phrase "as a result of activities" to read "as a result of an activity". It was the view of the Committee that no further modifications were appropriate since the corresponding provision in the Convention on the Watercourses had been the subject of extensive discussions in both the International Law Commission and the Sixth Committee.

Article 16

Mr. Chairman,

Article 16 is new and did not exist in the first reading text. The question of emergencies was addressed in the Convention on the Law of Non-Navigational Uses of International Watercourses, but was not dealt with in the context of these articles. There was general agreement that scenarios anticipated under these articles could well include situations of emergencies and they should therefore be addressed. In his last year report, the Special Rapporteur introduced two articles dealing with emergencies, which were inspired by article 28 of the Convention on the Watercourses.

Article 16 which is based on paragraphs 3 and 4 of article 28 of that Convention requires the State of origin to develop contingency plans for responding to emergencies, in cooperation, where appropriate, with the State likely to be affected and competent international organizations. The Committee introduced two minor amendments to the text proposed by the Special Rapporteur last year. They include the replacement of the plural with the singular form, so that the former subject "States of origin" now reads "The State of origin" and the former phrase "with other States likely to be affected" is now "with the State likely to be affected". The article is entitled "Emergency preparedness".

Article 17

Article 17 is also new and is based on paragraph 2 of article 28 of the Convention on the Watercourses. The purpose of the article is to require the State of origin to notify the State likely to be affected as expeditiously as possible of emergencies concerning an activity within the scope of these articles and to provide that State with all relevant and available information. You will note that the article does not define what an "emergency" is. The commentaries will elaborate on this issue and provide some guidance.

The Drafting Committee made some minor linguistic changes, for consistency with other articles, to the text proposed by the Special Rapporteur last year. The word "available" after the words "expeditious means" was replaced by the phrase "at its disposal". It was felt that differences could exist between the means which States could resort to, depending on their level of development; thus though particularly expeditious

means might exist and therefore be “available” in a general sense, not all States would, in a practical terms, have access to such means. Accordingly, the new phrase “at its disposal” seemed better suited to capture this nuance.

In addition, the former phrase “other States likely to be affected” has been replaced with the singular form “the State likely to be affected”. Furthermore, the Committee was of the view that the draft provision might be interpreted as limiting the obligation of the State of origin to a mere notification of the emergency, while the intent had been to ensure that the State likely to be affected be kept apprised of all the facts concerning the emergency. Consequently, to attain greater clarity the Committee decided to add a phrase at the end of the provision, which reads “and provide it with all relevant and available information”.

The article is entitled “Notification of an emergency”.

Article 18

Mr. Chairman,

I will now draw your attention to article 18, which corresponds to article 6 adopted on first reading. You will recall that the Special Rapporteur in his last year report suggested moving this article to the end of the substantive articles with which the Drafting Committee agrees.

This article, as clear from its title, establishes the relationship between the rights and obligations of States under these draft articles and other international obligations whether treaty based or based in customary international law.

In the context of this article, there were discussions in the Drafting Committee as to the nature of these articles; that is whether the draft articles represented a so-called “framework convention” or whether they represented a traditional convention. Different views were expressed in the Drafting Committee. It was clear in the Committee that there was no unified definition of a “framework convention”. While according to some,

in order for a framework convention to become enforceable, its application should be agreed upon by parties through another treaty, according to others a framework convention could directly be applicable without the assistance of any other treaty. At the end the Drafting Committee agreed that it was unnecessary to tackle that issue in this article. It would be eventually up to the States to decide. For example, in the Convention on the Law of the Non-Navigational Uses of International Watercourses, in the fifth preambular paragraph, the States parties referred to that convention as a "framework convention".

The Drafting Committee thought that it was important to decide whether to follow the example of paragraph 1 of article 3 of the Convention on the Watercourses, which dealt with the same issue as this article does, or to maintain the language of the first reading. You will recall that the text adopted on first reading stated that "Obligations arising from" the present draft articles were without prejudice to any other obligations incurred by States under relevant treaties or rules of customary international law. The corresponding provision in the Convention on the Watercourses speaks of nothing in that convention affecting "any rights or obligations" which may arise from existing agreements. In the view of the Drafting Committee that language was not appropriate for these draft articles. At the same time the text of the first reading which spoke of only "obligations" remaining unaffected could prove too restrictive. One important difference between this article and the corresponding provision in the Convention on the Watercourses is that the provision in that Convention dealt only with the relationship between that Convention and existing agreements prior to the entry into force of the Convention for a State Party. Article 18, here, however, deals not only with existing agreements but also with the future agreements and the development of customary law through State practice. It is certainly impossible to resolve all the questions of future conflict or over-lap between treaties, which is not the subject matter of these draft articles. The Committee, however, found it preferable to change the language of the first reading by deleting the reference to "obligations" at the beginning of the article and only referring to "the present draft articles" as being without prejudice to any obligations incurred by States. It goes without saying that the term "relevant" before treaties also

applies to the rules of customary international law. The Committee made no changes to the title of the article.

Article 19

Mr. Chairman,

The last article in this draft is article 19, which corresponds to article 17 adopted on first reading. You will recall that the first reading text comprised only 2 paragraphs both of which were taken partially from paragraphs 1 to 3 of article 33 of the Convention on the Watercourses. You will recall that the first paragraph only directed the parties to settle their dispute by peaceful means including those listed in that paragraph. Paragraph 2 directed the parties who could not agree on a mode for dispute settlement to resort to a fact-finding commission. The article, however, was a so-called a "disabled" dispute settlement provision. Its operation required full cooperation of all parties to the dispute. If one party to the dispute refused to cooperate, then no fact-finding commission could be set up.

In the view of the Drafting Committee, while it was prudent not to establish full fledge dispute settlement provisions for these articles which may be a disincentive for governments to join, it was nonetheless counterproductive to include a disabled dispute settlement provision which might undermine the obligations embodied in the draft. Either it should be no dispute settlement provision or a one paragraph standard provision directing the parties to settlement through peaceful means; or if any fact-finding commission is thought to be useful in the absence of any agreement among the parties to the dispute, it should be enforceable. The Drafting Committee was also of the view that due to similarities between these draft articles and those of the Convention on the Watercourses, their provisions on fact-finding Commission should be similar. The dispute settlement of that Convention was extensively negotiated by States and was found acceptable. On the basis of this analogy, the Drafting Committee revised the text of first reading and redrafted it, in a summary fashion, along the text of article 33 of the Convention on the Watercourses.

Paragraph 1 of the article sets out the obligation of the parties to settle expeditiously any dispute regarding the interpretation or application of these draft articles by peaceful means of their choosing. The means that seem most appropriate for the purposes of these articles are listed as including "negotiations, mediation, conciliation, arbitration or judicial settlement". The list is, of course, non-exhaustive. It was the view of the Drafting Committee, that when the paragraph speaks of "mutual agreement" of the parties for a mode of settlement, it includes also the agreement of the parties in a treaty which provide for a particular mode of settlement. The parties, for example, may have already agreed by another agreement to settle their disputes by arbitration or other modes. Clearly those obligations are intended to be included here. That is the reason for not using the words as was used in the Convention on the Watercourses, "in the absence of an applicable agreement" between the parties. The commentary will make this issue clear.

Paragraphs 2 and 3 correspond to paragraph 3 of article 33 of the Convention of the Watercourses. They select the establishment of a fact-finding Commission as a minimum, in case the parties could not agree on a dispute settlement mode themselves. Again as in paragraph 4 of article 33 of the Convention on the Watercourses, each party is to nominate one member of the commission and the members of the commission are to agree on a Chairperson. The Drafting Committee followed the established UN practice of using gender neutral terms and has replaced the word "Chairman" with the word "Chairperson".

Paragraph 4 is new. A similar paragraph does not exist in the Convention on the Watercourses. The Drafting Committee noted that the intention of a fact-finding Commission is to establish a body that is balanced and could hold the confidence of the parties to a dispute. So the structure of the fact-finding Commission should be balanced. In the context of these draft articles, it is quite possible that there may be one State of origin but more than one likely affected States. Therefore if each State party to the dispute is to select a member of the Commission, the Commission, by its very construction, would be imbalanced because there would be more members of the

Commission for States likely to be affected while the State of origin would have appointed only one member. To address this possible problem, the Drafting Committee considered two options: either to interpret "each party" to the dispute as including a collectivity of the States likely to be affected as all appointing a single member to the Commission, or allowing the State of origin to appoint the same number of members to the fact-finding Commission as the States likely to be affected would appoint. The Drafting Committee opted for the second option for the following reasons: first it cannot be assumed that all States likely to be affected will have the same concerns or their degrees of concerns are equally shared by other States likely to be affected; second in order to alleviate the concerns of the States likely to be affected about the independence and balanced character of the Commission and that their particular concerns will be well expressed and represented, it would be better to allow each State likely to be affected to appoint a member of the Commission. In turn, the State of origin could then appoint additional members of the Commission so as to have equal representation with the States likely to be affected. Paragraph 4 deals with this issue.

Paragraph 5 corresponds to paragraph 5 of Article 33 of the Convention on the Watercourses and provides for appointment of the members of the Commission by the Secretary-General of the United Nations, in case one of the parties refuses to cooperate.

Paragraph 6 corresponds to paragraph 8 of Article 33 of the Convention on the Watercourses. It provides that the Commission shall adopt its report which may also include recommendations by a majority vote and that the parties shall consider such a report in good faith.

Mr. Chairman,

As I explained at the beginning of my introduction of this article, the Drafting Committee tried to incorporate important aspects of article 33 of the Watercourses Convention here in summary fashion and as a result the article before you does not deal with the questions of the rules of procedure of the fact-finding Commission and its expenses. These issues could perhaps be addressed in the commentary. The essential

fact that would be useful to underline in the commentary is that this article was modeled after article 33 of the Convention on the Watercourses in the sense of creating a fact-finding Commission that was impartial and balanced and could be established and function even in the absence of cooperation of one of the parties to the dispute.

Preamble

Mr. Chairman,

I will now draw your attention to the preamble to the draft articles. As you are aware, it is not the practice of the Commission, in principle, to include preambles to the texts that it prepares. Last year, however, the Special Rapporteur had proposed a preamble to the draft articles on the assumption that the inclusion of some principles in the preamble might better project the balance of interests test which has been taken into account all the way through these articles. The Drafting Committee went along with this proposal. However, in the view of the Drafting Committee, a preamble to draft articles should focus only on the principles of importance to the draft and should not make reference to previous General Assembly resolutions which could include other issues not of concern to the draft or that have not been taken into consideration. In fact this is the difference between a preamble to draft articles and a preamble to a resolution of the General Assembly, which automatically recalls previous resolutions. For that reason, the Drafting Committee revised the proposed preamble by the Special Rapporteur. The present text before you comprised 5 paragraphs. Paragraph 1 refers to Article 13, paragraph 1(a) of the Charter of the United Nations which provides that the General Assembly shall initiate studies and make recommendations for the purpose of encouraging the progressive development of international law and its codification. Paragraph 2 refers to the principle of permanent sovereignty of States over natural resources within their territory or otherwise under their jurisdiction or control. Paragraph 3 refers to the freedom of States to carry on or permit activities in their territory or otherwise under their jurisdiction or control as not being unlimited. In fact paragraphs 2 and 3 both of which have also their roots in the Rio Declaration are intended to set the basis for test of balance of interest. Paragraph 4 recalls the Rio Declaration on the Environment and Development. There was some discussion in the Drafting Committee

as to whether two specific principles of the Rio Declaration should also be highlighted. Those were the principles of precautionary approach and of sustainable development. At the end the Drafting Committee decided that the reference to the entire Rio Declaration was sufficient to indicate the relevance of all the important principles embodied therein. The commentary could in particular make a more notable account, in more detail, of the principles of precautionary approach and sustainable development as well as the polluter-pay principle. In addition, commentaries to articles 3, 10 and 11 could also make reference to these principles.

Mr. Chairman,

You will also note that the preamble begins with the words “the States Parties” which is rather unusual. Since as I indicated earlier, it is not the practice of the Commission to include a preamble to the draft articles, there were no models to follow. The preamble cannot be left without an opening phrase since it sets out an agreement to what follows by those who set out the preamble. The Drafting Committee, therefore, decided to start the preamble with the words “The States Parties”.

Mr. Chairman,

This concludes my introduction of the report of the Drafting Committee on the second reading of this topic. The draft articles on Prevention of transboundary harm from hazardous activities are now before you for adoption.

I thank you for your attention sir.